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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision of the Committee under the Optional Protocol, concerning Communication No. 2490/2014*, **

Communication submitted by:	Vivian Maritza Hincapié Dávila (represented by Germán Eduardo Gómez Remolina, Elkin de Jesús Betancur Ramírez and Carlos Rodríguez Mejía)
Alleged victim:	The author
State party:	Colombia
Date of communication:	15 November 2013 (initial submission)
Reference:	Decision by the Special Rapporteur pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 5 December 2014 (not issued in document form)
Date of adoption of decision:	6 April 2018
Subject matter:	Right to challenge a conviction handed down by a court of second instance
Procedural issues:	Abuse of the right of submission; non-substantiation
Substantive issues:	Right to have a sentence reviewed by a higher court; right to an effective remedy; presumption of innocence
Articles of the Covenant:	2 (2) and (3), 9, 14 (2) and (5), 23 and 24
Article of the Optional Protocol:	3

1.1 The author of the communication, which was initially submitted on 15 November 2013, is Vivian Maritza Hincapié Dávila, a Colombian national who was born on 11 September 1981. She claims that the State party has violated her rights under articles 2 (2) and (3), 9, 14 (2) and (5), 23 and 24 of the Covenant.[1] She also claims that the State party has violated her rights under articles 14 (2) and (5), read in conjunction with article 2 (3).

* Adopted by the Committee at its 122nd session (12 March to 6 April 2018).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

[1] The claims made with regard to articles 2 (2), 9, 23 and 24 were submitted in the author's additional comments dated 13 June 2016. See paras. 9.3 ff.

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The author is represented by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

1.2 On 23 February 2017, the Committee, acting by way of the Special Rapporteur on new communications and interim measures and in accordance with rule 92 of its rules of procedure, denied the author's request of 29 January 2017 for interim measures which were intended to secure her release.

Factual background

2.1 On 10 June 2002, the author was invited by her boyfriend, R.C., to spend the night at "a friend's" ranch located in the municipality of La Virginia in the department of Risaralda. The author states that she had met R.C. for the first time a month before the events in question and that R.C. picked her up at her home in a vehicle in which F.R. was also a passenger; according to the author, the latter did not show any signs of being there against his will. After some friendly introductions, they headed to the ranch, intending to have a good time together. That same day, one of the Colombian Army's United Action Groups for Personal Liberty entered the ranch and freed F.R., who was being held there against his will.

2.2 On 12 June 2002, the prosecution service issued a pretrial detention order against the author on suspicion of kidnapping. An appeal of the order was lodged with the Office of the Third Prosecutor assigned to the High Court of Pereira; the appeal was dismissed on 26 July 2002. On 6 March 2003, the Office of the First Special Prosecutor charged the author with the offences of kidnapping for extortion and illegal carrying of a weapon, and those charges were upheld by the Office of the Second Prosecutor assigned to the High Court of Pereira on 11 April 2003. On 24 December 2003, the Criminal Circuit Court of Pereira acquitted the author. In the Court's view, the author had not played any significant part in the kidnapping and had had only a passive role. Furthermore, the Court indicated that at no time had the author acted as a guard or otherwise been engaged in the kidnapping in any tangible way. Although the Court recognized that the author knew that F.R. was being held against his will and that she had lied during the trial to protect her boyfriend, R.C., her conduct did not warrant being charged with the same offences as the other defendants, i.e., kidnapping for extortion and illegal carrying of a weapon.

2.3 The judgment of the Criminal Circuit Court of Pereira was appealed both by the defendants who had been convicted and by the prosecutor before the Criminal Chamber of the District High Court of Pereira. On 4 March 2004, the High Court overturned the judgment of the court of first instance with regard to the author and sentenced her to prison for 28 years and 6 months and a fine of 5,000 times the minimum monthly wage for the offences of kidnapping for extortion and illegal carrying of a weapon. The High Court noted that the author had been caught in flagrante delicto — she was in the same room as R.C. and F.R. when one of the Colombian Army's United Action Groups for Personal Liberty freed F.R. — and it could therefore be concluded that she was aware of the activities connected with the kidnapping. Furthermore, the High Court was of the view that a number of pieces of evidence demonstrated the author's responsibility as a co-perpetrator of the offence of kidnapping for extortion, given that, as mentioned, she was with R.C. as he guarded F.R. and that, according to a witness, she had said that if the sum demanded was not paid, F.R.'s life would be in danger. Regarding the offence of illegal carrying of a weapon, the High Court affirmed that, in line with well-established jurisprudence, individuals who are part of a group of people who together commit an unlawful act are liable for this offence even if they themselves were not carrying any weapon.

2.4 The author filed an appeal in cassation against the decision of the High Court, arguing that the Court had committed an error of fact in that her presence at the scene of the offence as a companion was not sufficient reason to find her guilty of the offence of kidnapping for extortion, which would require that she had seized, carried away, imprisoned or hidden a person against his or her will (Criminal Code, art. 169). She further argued that having told F.R. to "just get the money and avoid any more problems" was not an indication of her participation in the kidnapping but, rather, of her concern for F.R.

2.5 On 4 May 2005, the Supreme Court dismissed the appeal in cassation on the grounds that it did not meet the corresponding formal submission requirements under domestic law. Among other issues, the author had not stated or sufficiently substantiated her reasons for believing that the court of second instance had committed an error of fact in the conviction handed down on 4 March 2004. In addition, the Supreme Court considered that the author had failed to establish that the court of second instance had misrepresented or distorted the evidence during her trial and that she had failed to differentiate between two elements of an error of fact which are to be argued in two different ways.[2]

2.6 On 26 March 2007, the author lodged an application for legal protection (*acción de tutela*) before the Criminal Cassation Chamber of the Supreme Court. She alleged that her rights to due process and liberty had been violated by the second-instance judgment in that the latter was not sufficiently reasoned. In addition, she argued that the High Court had assessed the evidence incorrectly and had thereby exercised its judicial function in an arbitrary manner (*vía de hecho*). On 12 April 2007, the Chamber dismissed the application for legal protection on the grounds that the author had had the opportunity in her appeal for cassation to defend the rights that had allegedly been violated. The Chamber noted that an application for legal protection cannot be used to reopen judicial proceedings that have been concluded unless there has been a violation of due process, which did not occur in this case. It further noted that the application for legal protection was not filed within a reasonable time frame: the application was filed on 26 March 2007, the judgment it was challenging dated from 4 March 2004 and the decision disallowing the appeal in cassation was dated 4 May 2005, which was nearly two years before the application for legal protection was filed. On 7 May 2007, the Civil Cassation Chamber of the Supreme Court ruled the proceedings before the Criminal Cassation Chamber null and void with regard to the application for legal protection inasmuch as the Criminal Cassation Chamber had already heard the author's case before, at which time it had dismissed the appeal in cassation against the conviction.

2.7 On an unknown date, the author submitted to the Civil Cassation Chamber of the Supreme Court an application for legal protection against the Criminal Cassation Chamber, the Criminal Chamber of the High Court of Pereira and the Criminal Circuit Court of Pereira. On 22 May 2007, the Civil Cassation Chamber dismissed the application on the grounds that the 4 May 2005 decision of the Criminal Cassation Chamber dismissing the appeal in cassation against the conviction had put an end to the judicial proceedings and that these proceedings could not be reopened, even pursuant to an application for legal protection, because the judgment had been rendered by the highest court of the ordinary legal system.

2.8 On 15 February 2008, the author filed another application for legal protection with the Jurisdictional Disciplinary Division of the Sectional Council of the Judiciary of Risaralda for violation of her rights to a defence, liberty and due process. The application was found inadmissible on 29 February 2008 on the grounds that it had not been submitted within a reasonable time frame, inasmuch as the Supreme Court decision that had concluded the criminal proceedings against the author had been issued 2 years and 18 days prior to the filing of the petition. In addition, the Sectional Council of the Judiciary of Risaralda observed that the author had taken nearly eight months to file the application, calculated as from the dismissal of the first application for legal protection lodged with the Civil Cassation Chamber of the Supreme Court (decision issued on 22 May 2007). On 10 March 2008, the author appealed the ruling before the Jurisdictional Disciplinary Division of the High Council of the Judiciary, making the same arguments as she had in her application for legal protection of 15 February 2008 and noting that the decision being

[2] The Supreme Court refers to the author's having confused misrepresentation (*falso juicio de identidad*) with misinterpretation (*falso juicio de raciocinio*). The former is an error of fact whereby a judge distorts or misrepresents the factual content of the evidence by attributing to it effects that do not flow from it. The latter relates not to the material consideration of the evidence but, rather, to the judge's reasoning in respect of the evidence; in other words, the judge makes a mistake in the assessment of the evidence. Accordingly, when arguing the former, the appellant should claim that the objective content of the evidence was altered, while, if arguing the latter, the appellant should claim that it was the assessment of the evidence that was faulty.

appealed had not resolved the substantive issues. On 23 April 2008, the High Council of the Judiciary dismissed the application because it had not been submitted in a timely manner, i.e., it was presented seven days after the notification of the decision rather than within the three days provided for by law.

2.9 On 29 February 2012, the author filed another application for legal protection with the Civil Cassation Chamber of the Supreme Court against the decisions of the Criminal Circuit Court of Pereira, the Criminal Chamber of the High Court of Pereira and the Criminal Cassation Chamber of the Supreme Court for denial of justice. On 13 April 2012, the Civil Cassation Chamber dismissed the application, noting that the options for constitutional remedies had been exhausted with the Chamber's decision of 22 May 2007, and ordered the author to comply with that decision. The author appealed the dismissal before the Chamber, which upheld its previous decision on 27 April 2012 and declared the appeal inadmissible.

2.10 The author claims that she has exhausted all available domestic remedies.

The complaint

3.1 The author claims that the State party has violated her rights under articles 2 (2) and (3), 9, 14 (2) and (5), 23 and 24. She further claims that the State party has violated her rights under article 14 (2) and (5), read in conjunction with article 2 (3), of the Covenant.

3.2 Regarding the violation of the right to the presumption of innocence enshrined in article 14 (2) of the Covenant, the author affirms that all persons are innocent until proven otherwise, but contends that this was not the case at her trial since she was convicted by a court of second instance on the basis of the same evidence that had led the first-instance court to acquit her and without any new evidence being presented to the higher court. Thus, the court of second instance handed down a conviction that was devoid of any evidentiary basis. The author points out that the judgment convicting her does not explain the nature of the errors purportedly made by the lower court in acquitting her, nor does it indicate how the evidence in the files was assessed in order to arrive at the conclusion that she was responsible for the offences of which she stood accused. The author maintains that the judgment infringed the legal principles in force at the time, according to which judgments having an impact on fundamental rights needed to be reasoned.[3] In addition, the judgment also does not dispel any doubts that might exist in the author's favour.

3.3 The author further maintains that the court of second instance committed an error that demonstrates its "carelessness and lack of reasoning and analysis" inasmuch as, in the preambular part of its judgment, it included a reference to A.R., a person who was not a party to the proceedings. In the author's opinion, this shows that the court did little more than copy and paste an excerpt from a decision in another case.

3.4 Regarding the violation of article 14 (5) of the Covenant, the author maintains that the judgment sentencing her to 28 years and 6 months in prison was not reviewed by a higher court as provided for in the Covenant. The author refers to the Committee's Views in *Gómez Vázquez v. Spain*, in which the Committee held that the lack of any possibility to have a conviction and sentence fully reviewed on appeal in cassation is not in line with the guarantees set forth under article 14 (5) of the Covenant inasmuch as the review is limited to the formal or legal aspects of the judgment.[4] The author also refers to general comment No. 32 (2007) on the right to equality before courts and tribunals and to fair trial, whereby the right to have one's conviction and sentence reviewed by a higher tribunal, as established under article 14 (5), imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that

[3] The author refers to articles 13 and 24 of Act No. 600 of 2000. Article 13, which deals with the principle of adversarial proceedings, provides that "persons on trial have the right to present and refute evidence during proceedings. The judge is required to justify measures that have an impact on the fundamental rights of the person on trial, even when these measures are contained in the judicial decision." Pursuant to article 24, the rules, including the principle of adversarial proceedings, are binding and take precedence over all other provisions.

[4] See CCPR/C/69/D/701/1996, para. 11.1.

the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction, without any consideration whatsoever of the facts, is not sufficient under the Covenant (para. 48). The author further refers to paragraph 47 of the same general comment, which provides that article 14 (5) is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, cannot be reviewed by a higher court.

3.5 Regarding the combined violation of articles 2 (3) and 14 (5) of the Covenant, the author submits that the two articles are closely linked and that, by reason of the violation of article 14 (5), her right to an effective remedy was also violated inasmuch as the State failed to discharge its obligation to provide and facilitate access to an effective remedy that allows for the substantive review of the second-instance judgment.[5] The author contends that the safeguard consisting in the review of the conviction was also breached by the fact that the second-instance decision was not reasoned.[6]

3.6 The author maintains that, even though the right to be heard at second instance is enshrined in the Constitution,[7] the State party's legal order does not provide a remedy for the full review of a conviction handed down by a court of second instance, since only the extraordinary remedies of cassation and judicial review apply to this type of judgment.[8] These remedies apply in only limited situations established by law and are not intended to provide a full review of a conviction.[9] The author cites decisions of the Supreme Court in which it states that the remedy of appeal in cassation is not an instrument that is intended to allow for the factual and legal debate to be continued as if it were a further instance in addition to the ordinary courts that adjudicated the case, but rather that it constitutes a unique forum that is grounded in the premise that the process culminated with the judgment rendered in second instance.[10] In addition, the author notes that the remedy of cassation is of a limited nature, given that, as it has established, the Supreme Court is precluded from providing complementary or supplemental information, clarifications or corrections to shortcomings or errors in the case;[11] this limitation does not apply to ordinary remedies.[12] The author states that judicial review is also an extraordinary remedy and that its purpose is

[5] The author notes that this right is also enshrined in article 229 of the Constitution, which safeguards the universal right to access to justice.

[6] The author refers to general comment No. 32, para. 49.

[7] The author refers to article 29 of the Constitution, which states: "All persons shall be presumed to be innocent until found guilty by a court of law. Any person accused of having committed a crime shall have the right to a defence and the assistance of a lawyer of his or her choosing, or to have one assigned by the court, during the investigation and trial phases; the right to a public trial without undue delays; the right to present evidence and to refute any evidence presented against him or her; the right to challenge a conviction; and the right not to be tried twice for the same offence."

[8] The author refers to the decision of the Inter-American Commission on Human Rights in *Juan Carlos Abella v. Argentina*, in which the Commission stated that the special remedy does not allow for legal review by a higher court of the decision or of all important procedural rulings, including the sufficiency and legality of the evidence, nor does it allow for examining the validity of the judgment under appeal. Accordingly, it is a remedy of limited scope, available only on an exceptional basis, whose application is narrow, and therefore does not satisfy the guarantee whereby the accused may challenge the judgment (report No. 55/97, case No. 11.137, para. 269).

[9] The author notes that these remedies are governed by articles 205, 207 and 220 of Act No. 600 of 2000, which were in force at the time the judgment was handed down. The author refers to the judgment of the Inter-American Court of Human Rights in *Herrera Ulloa v. Costa Rica*, in which the Court stated that the writs of cassation filed to challenge the conviction did not satisfy the requirement of a liberal remedy that would permit the higher court to do a thorough analysis or examination of all the issues debated and analysed in the lower court (para. 167).

[10] The author cites a number of judgments of the Supreme Court, including the Criminal Cassation Chamber judgment of 14 March 2007, No. 26938, Mauro Solarte Portilla (reporting judge).

[11] The author cites a judgment of the Criminal Cassation Chamber of the Supreme Court, docket No. 12630, Jorge Aníbal Gómez Gallego (reporting judge), registered record No. 38.

[12] The author refers to another decision of the Supreme Court, according to which the remedy of cassation is a unique procedure that is not intended to repeat proceedings of lower courts or constitute a new review of the case (Criminal Cassation Chamber, docket No. 12386, Herman Galán Castellanos (reporting judge), registered record No. 082).

not to review a conviction but, rather, to consider the res judicata in the light of subsequent events that call into question the soundness of the decision.

State party's observations on admissibility

4.1 On 1 June 2015, the State party submitted its observations on the admissibility of the communication. It maintains that the communication is inadmissible because the Committee has no mandate to act as a fourth instance and because the right to submit a communication is being abused inasmuch as the complaint is manifestly unfounded.

4.2 The State party maintains that the decisions of the national courts were all grounded in domestic law. Both the Constitution[13] and Act No. 600 of 2000 (art. 191), in force at the time of the events, provide for the right to challenge any judicial decision. Accordingly, defendants can appeal against convictions and prosecutors can appeal against acquittals. The State party refers to the jurisprudence of the Constitutional Court, which indicates that the purpose of an appeal is for a higher court to scrutinize the res judicata and correct any legal errors or flaws in the proceedings, or in the judgment, which may have been made by the lower court.[14] Furthermore, the State party notes that the Constitutional Court has confirmed that appeals may be lodged against acquittals in criminal cases, specifying that such appeals constitute an additional instance for criminal proceedings.[15] Therefore, in the author's case, the appeal against the first-instance judgment by the prosecutor and the convicted defendants was permitted under applicable law, with the result that the author was convicted by a court of second instance.

4.3 The State party also maintains that the author had the opportunity to appeal against her conviction through the special remedy of appeal in cassation and that this appeal was rejected by the Supreme Court on 4 May 2005 for failure to frame her arguments correctly. This decision brought the criminal proceedings against the author to their final conclusion, since it was issued by the highest judicial body in the applicable sphere of jurisdiction. The author also had the opportunity to lodge applications for legal protection against the judgments that were not in her favour.

4.4 In view of the foregoing, the State party is of the opinion that the communication essentially reflects the author's dissatisfaction at judgments issued through due process by the national courts and is an attempt to use the Committee as an appellate body (in fourth instance) to debate the legal process followed by the criminal justice system.[16] However, the Committee is not competent to review judicial decisions reached by lawfully established and constitutionally recognized national courts or to assess the facts, evidence and lines of investigation in cases tried by national courts. The State party submits that, as has been demonstrated,[17] the judicial authorities who heard the author's case acted in keeping with the criminal legislation in force at the time of the events. Moreover, the author had the opportunity to avail herself of all the remedies she deemed appropriate.

4.5 The State party maintains that the author's communication constitutes an abuse of the right to submit a communication. It recalls that the Committee has held that a communication may be considered inadmissible when the alleged victim has deliberately submitted unclear information to the Committee or when a significant period of time has elapsed between the events and the submission of the complaint.

4.6 The author has abused the right of submission inasmuch as the claim that her rights under article 14 (2) were violated is not consistent with the "factual and procedural" reality of the case, since the criminal proceedings against her complied with all the judicial safeguards provided for by law, including the right to a defence and the right to lodge an appeal, and all remedies were exhausted. The State party points out that the Committee has

[13] Articles 29 and 31.

[14] The State party refers to Constitutional Court judgment No. C-968-03, case No. D-4607, issued on 21 October 2003, Clara Inés Vargas (reporting judge).

[15] Constitutional Court judgment No. C-047-06, case No. D-5783, issued on 1 February 2006, Rodrigo Escobar Gil (reporting judge).

[16] The State party refers to *G.A. van Meurs v. Netherlands* (CCPR/C/39/D/215/1986), para. 7.1.

[17] See paras. 4.2 and 4.3.

established that, although States parties have an obligation to conduct a substantive review of convictions that is not limited to formal aspects, there is no requirement to hold a new trial or hearing. The only requirement is that the court of second instance examine: (a) the charges brought against the defendant; (b) the evidence presented at trial; and (c) the arguments on appeal; and that these three elements lead to the conclusion that there was sufficient evidence to warrant a conviction.[18] In the present case, the decision of the High Court of Pereira of 4 March 2004 was based on these three elements and it is, therefore, an abuse of the right of submission to claim a violation of the right to the presumption of innocence.

4.7 The State party considers that, since the Committee has indicated that article 14 (5) should be interpreted as meaning that States parties have an obligation to guarantee effective access to available appellate bodies in their legal order,[19] there was no violation of this provision of the Covenant in the present case because effective access was duly guaranteed. The criminal proceedings against the author did not end with the decision of the High Court of Pereira; the author was able not only to file an appeal in cassation but also to lodge applications for legal protection on several occasions. The legal order thus clearly provides for various legal remedies of which the author was able to avail herself in order to challenge the second-instance judgment. The State party is of the opinion that the author further abused the right of submission by claiming that she did not have an effective remedy to challenge the judgment in question, which belies the "factual and procedural reality". The fact that the challenges were rejected for reasons attributable to the author is a different matter.

4.8 The State party maintains as well that the claim that article 14 (2) of the Covenant has been infringed was not sufficiently substantiated for the purposes of admissibility, inasmuch as the author alleges that the High Court of Pereira did not review the evidence but does not provide any details in that regard. The claim of a violation of article 14 (5) has also not been sufficiently substantiated, inasmuch as the author argues that an appeal in cassation does not guarantee the right enshrined in that article but fails to explain precisely why an appeal in cassation is not an effective remedy, simply noting that it allows only for a review of formal aspects. Lastly, the State party considers that the claim of a violation of the right to an effective legal remedy, as enshrined in article 2 (3) of the Covenant, is unfounded because the author had effective access to all available legal remedies, including applications for legal protection against judicial measures.

Author's comments on the State party's observations on admissibility

5.1 On 8 September 2015, the author responded to the State party's observations on the admissibility of the communication. She maintained that the communication meets the admissibility requirements established in the Optional Protocol. She points out that the State party, in its observations, failed to indicate that the Constitutional Court has determined that no effective judicial remedy exists in the domestic legal order for challenging convictions handed down on appeal to persons acquitted in a lower court. In its decision No. C-792-14, which declared unconstitutional several provisions of the Code of Criminal Procedure currently in force (Act No. 906 of 2004),[20] the Constitutional Court states that the right to challenge a judgment does not depend on the point in time at which the judgment was handed down but rather on its content. Therefore, this right can be exercised against convictions handed down on appeal. The Court also stipulates that, where convictions handed down on appeal are concerned, the remedy of cassation does not meet constitutional standards for the right to appeal.[21] With regard to the remedies of judicial

[18] The State party refers to general comment No. 32, para. 48, and to a number of communications, including *Pérez Escolar v. Spain* (CCPR/C/86/D/1156/2003), para. 9.3.

[19] The State party refers to *Henry v. Jamaica* (CCPR/C/43/D/230/1987), para. 8.4.

[20] Constitutional Court judgment No. C-792-14, case No. D-10045, issued on 29 October 2014, Luis Guillermo Guerrero (reporting judge).

[21] Ibid., pp. 68 ff.

review and applications for legal protection against judgments, the Court has found that they do not constitute appropriate remedies for challenging this type of judgment.[22]

5.2 With regard to the State party's statement that the author is seeking to have the Committee act as a court of appeal in examining her case, the author submits that she is not requesting the Committee to evaluate the facts and evidence relating to her case and she understands that the Committee is not a review body for the decisions of domestic courts. Her communication mentions the facts and evidence relating to her case only to show that her right to due process was not respected in the appeal court's examination of the proceedings.

5.3 As to the argument that the communication constitutes an abuse of the right of submission, the author considers that the State party acted wrongly in failing to inform the Committee about decision No. C-792-14, in which the Constitutional Court determined that there is no effective remedy for challenging convictions handed down on appeal, as prescribed by article 14 (5) of the Covenant. The author further submits that the State party did not inform the Committee that the Constitutional Court had urged the Congress to enact comprehensive legislation, within one year from the date of notification of the judgment, to ensure the right to challenge convictions; Congress has yet to take action in that regard. Accordingly, the author considers that the State party is ill-placed to accuse her of abuse of the right of submission given that it has failed to comply with its international obligations under the Covenant.

5.4 The author concludes that the claim that the communication is not sufficiently substantiated is groundless, since the arguments detailed above demonstrate not only that the communication is properly substantiated but also that it is legitimate and, furthermore, that it has the backing of the Constitutional Court of the State party.

State party's observations on the merits

6.1 On 2 December 2015, the State party submitted its observations on the merits of the communication, reiterating that the criminal proceedings against the author had complied with domestic legislation, including the Constitution and criminal legislation in force at the time of the events.

6.2 The State party reiterates that the author was seeking to have the Committee act as an appeal body in order to challenge the judicial proceedings of the criminal justice system and that it is not the Committee's role to review judicial decisions of domestic courts. In this regard, it submits that the fact that the domestic courts did not find in the author's favour in the remedies pursued by the author does not mean that it has violated the Covenant. According to the Committee's jurisprudence, unless it can be demonstrated that the assessment made by the domestic authorities was clearly arbitrary or amounted to a denial of justice, no violation of the Covenant exists.[23] Therefore, given that the criminal proceedings against the author were conducted in accordance with the domestic legislation in force at the time of the events, and that the decisions of the domestic courts were based on a reasonable interpretation of that legislation, there are no grounds for claiming that they were arbitrary or amounted to a denial of justice.[24]

6.3 With regard to the author's allegations of violations of articles 14 (5) and 2 (3) of the Covenant, the State party reiterates that the legislation governing criminal procedure at the time of the events allowed for the remedy of appeal to challenge decisions issued by lower

[22] Ibid., pp. 71 ff.

[23] The State party refers to the observations it submitted with respect to *R.A.D.B. v. Colombia* (CCPR/C/103/D/1800/2008), para. 5.6.

[24] The State party refers to a judgment of the Inter-American Court of Human Rights which states: "In general, a judgment must be the reasoned derivation of the law, based on the facts of the case. But a judgment may be a reasoned derivation of the law and still be arbitrary. An arbitrary ruling would observe all the formalities of a court ruling, but its flaws would be so serious as to vitiate it as a jurisdictional act. In the instant case, the judgment delivered by the Argentine Supreme Court is based upon the norms governing the validity and nullity of legal acts. ... In this Court's view, the judgment delivered by the Argentine Supreme Court cannot be regarded as an arbitrary ruling." (*Cantos v. Argentina*, para. 63).

courts, including acquittals. It further contends that, bearing in mind that the Committee has held that article 14 (5) of the Covenant should be interpreted to mean that, if domestic law provides for other instances of appeal, the State should guarantee effective access to them, it follows that that provision of the Covenant was duly respected, given that the author was afforded effective access to the remedies of cassation and application for legal protection.

6.4 The State party reaffirms its position that the communication constitutes an abuse of the right of submission.

Author's comments on the State party's observations on the merits

7.1 On 29 February 2016, the author submitted her comments on the State party's observations, reiterating that the communication meets all the requirements for admissibility under articles 2, 3 and 5 of the Optional Protocol and rule 96 of the Committee's rules of procedure. The author further reiterates that she is not asking the Committee to give her case a fourth hearing but to examine the violation of her rights under article 14 (5) of the Covenant.

7.2 With regard to the State party's argument that the communication constitutes an abuse of the right of submission, the author maintains that it is untrue that her assertion that there is no effective remedy in the Colombian legal system for challenging convictions handed down on appeal is contrary to "factual and procedural" reality. The author contends that this assertion is entirely true and that it has, moreover, been upheld by the Constitutional Court of Colombia.[25] With regard to the State party's position that cassation constituted an effective remedy for the author, she maintains that it did not and refers to the Constitutional Court's judgment in that respect.[26] She concludes that the State party's argument is therefore entirely groundless.

7.3 The author refers to the requirement that domestic remedies must be exhausted. She maintains that her communication meets that requirement, since she availed herself of a number of remedies, but none of them were suited to her case. Consequently, she cannot be required to exhaust remedies that were not available to her.

7.4 The author asks the Committee to order the State party to conduct a new criminal trial in her case that affords all the guarantees enshrined in the Covenant and in article 250.4 of the Constitution, namely, oral adversarial proceedings which are held in public with all due guarantees and which observe the principles of concentration and of immediacy of evidence.

Additional submissions by the parties

State party

8.1 On 22 April 2016 and 31 January 2017, the State party provided additional submissions in which it reiterates its earlier arguments. Regarding the appeal in cassation, the State party contends that it indeed was an appropriate remedy in the author's case and refers to the Committee's decision in *J.J.U.B. v. Spain*. In that case, the author alleged a violation of article 14 (5) because he had not been afforded the possibility of having his conviction and sentence reviewed by a higher court. That communication was declared inadmissible on the grounds that, even though the author had had access only to the remedy of cassation before the Supreme Court, the Court "had proceeded to detail the criteria justifying the sentence, confirming that it was correct and proportionate to the seriousness of the offence".[27]

8.2 The State party further submits that, irrespective of whether or not appeal in cassation constituted an effective remedy, the author enjoyed the protection of all the judicial guarantees enshrined in the Colombian legal system and that she also had availed

[25] See para. 5.3.
[26] See para. 5.1.
[27] CCPR/C/106/D/1892/2009, para. 7.5.

herself of the remedy of applying for legal protection on more than one occasion.[28] The State party also submits that it cannot be held responsible for errors committed by the author's counsel which led to her petitions for the remedies of cassation and legal protection to be denied.

8.3 The State party reiterates that the communication should be declared inadmissible on the grounds that it constitutes an abuse of the right of submission. In addition, it was submitted almost six years after all domestic remedies had been exhausted, which is inconsistent with the provisions of the Optional Protocol and the Committee's rules of procedure.

Author

9.1 The author submitted additional information on 13 June 2016, in which she reiterates her previous arguments. With regard to the State party's observations to the effect that the Committee had held that the remedy of cassation meets the requirements of article 14 (5) of the Covenant, the author submits that the State party is seeking to use the Committee's jurisprudence to contradict that of the Constitutional Court. She contends that no such contradiction exists, particularly given that the Constitutional Court specifically based its reasoning in judgment No. C-792 of 2014 on, inter alia, article 14 (5) of the Covenant. The author also refers to the Committee's Views in *Pérez Escolar v. Spain*, in which the Committee found that the remedy of cassation constituted an effective remedy inasmuch as the judge had considered all the irregularities alleged by the appellant and conducted a thorough examination of the facts, the evidence and the legal norms on which the sentence had been based.[29] The author concludes that, for both the Committee and the Constitutional Court, the key aspect is that, irrespective of the name by which a remedy is known, a full review of the conviction should be conducted, and that did not happen in her case.

9.2 With regard to the State party's argument that the communication is an abuse of the right of submission because it was filed so long after all domestic remedies had been exhausted, the author reiterates that, after her appeal in cassation was dismissed, she sought to protect her rights by means of a number of applications for legal protection, but those applications were rejected for various reasons. She again maintains that, because it is undisputed that the State party does not provide any remedy to challenge a conviction handed down on appeal, it is inconceivable that the State party should accuse her of abusing the right of submission, given that it has failed to comply with its international obligations.

9.3 The author adds that her rights under article 2 (3) have been violated as well because the State party failed to take the necessary steps to give effect to her right to have recourse to a higher court to challenge a conviction handed down by an appeal court,[30] despite the fact that the Constitutional Court has ordered lawmakers to introduce such a remedy, which they still have not done. The author further asserts that, in these circumstances, her detention is arbitrary and breaches article 9 of the Covenant.

9.4 The author further claims that being detained arbitrarily also violates the rights of her two minor children under articles 23 and 24 of the Covenant, as they have been deprived of essential care from their mother, who is also the head of the family.

9.5 Lastly, the author asks the Committee to order the State party to provide, by means of a brief and expedited procedure, compensation for the material and moral harm that she has suffered as a result of the violations of her rights as expounded above. She further

[28] The State party refers to a Constitutional Court judgment on an application for legal protection in a case similar to the author's in which the Court held that the petitioner could not use that remedy to reopen a criminal trial that had already been concluded, especially given that the application for legal protection against the conviction handed down by the appeal court had been lodged so long after the petitioner had been convicted. Constitutional Court, case No. T-381345, judgment No. T-1661-00, 30 November 2000, Alfredo Beltrán Sierra (reporting judge).

[29] See CCPR/C/86/D/1156/2003, para. 9.3.

[30] The author refers to general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 13.

requests the following measures of redress: (a) that the State party be ordered to provide psychosocial support to her and her children because of the impact of the separation that has been imposed upon them; (b) that the State party be ordered to apologize to the author, her children and her family for having violated her rights to freedom, the presumption of innocence and access to an effective judicial remedy for challenging convictions handed down on appeal; and (c) that, as a guarantee of non-repetition, the State party be ordered to introduce, within one year of notification of the Committee's Views, an effective judicial remedy for challenging convictions handed down by a court of first, second or sole instance. She also requests that persons whose right to challenge convictions is violated be afforded the possibility of a new public trial that is oral and impartial and fully observes all safeguards.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

10.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee takes note of the State party's argument that the communication constitutes an abuse of the right to submit a communication under article 3 of the Optional Protocol because the author submitted the communication to the Committee almost six years after domestic remedies had been exhausted (para. 8.3). The Committee also notes the author's claims that, since the State party does not provide an effective remedy for challenging a conviction handed down on appeal, it is inconceivable that the State party should accuse her of abuse of the right of submission when it is clear that the State party itself has failed to comply with its obligations under the Covenant, in particular article 14 (5) (para. 9.2).

10.4 The Committee recalls that, although there is no explicit deadline for the submission of communications under the Optional Protocol, rule 96 (c) of its rules of procedure states: "An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission, when it is submitted after 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication."[31] The Committee also recalls its jurisprudence, according to which the right of submission is considered to have been abused when an exceptionally long period of time has elapsed, without sufficient justification, between the relevant events in the case or the exhaustion of domestic remedies and the submission of the communication in question.[32]

10.5 In the present case, the Committee notes that the Criminal Circuit Court of Pereira acquitted the author on 24 December 2003 and that that judgment was appealed by the prosecutor and by the author's convicted co-defendants. On 4 March 2004, the High Court of Pereira overturned that judgment and convicted the author. The Committee also notes that the author filed an appeal in cassation with the Supreme Court against the High Court's judgment; that appeal was dismissed on 4 May 2005.

10.6 The Committee notes that, after the appeal in cassation had been dismissed, the author filed a number of applications for legal protection. All those applications were

[31] This rule applies to communications received by the Committee after 1 January 2012.

[32] See *J.B. v. Australia* (CCPR/C/120/D/2798/2016), para. 7.7; *C.L.C.D., V.F.C. and A.F.C. v. Colombia* (CCPR/C/116/D/2399/2014), para. 6.5; *Fillacier v. France* (CCPR/C/86/D/1434/2005), para. 4.3; and *M.B. v. Czech Republic* (CCPR/C/106/D/1849/2008), para. 7.4.

denied, however, either on formal grounds or because they had not been submitted within a reasonable time frame.

10.7 In particular, the Committee notes that, on 26 March 2007, the author filed an application for legal protection against the appeal court's judgment; that application was disallowed by the Criminal Chamber of the Supreme Court on 12 April 2007. The aforementioned action was subsequently declared null and void, on 7 May 2007, as the Chamber had already ruled on the author's case when it had dismissed the appeal in cassation against her conviction. The Committee further notes that the author filed another application for legal protection before the Civil Cassation Chamber of the Supreme Court and that that application was disallowed on 22 May 2007 because it was considered that, with the decision of the Criminal Cassation Chamber of 4 May 2005 to reject the author's appeal against her conviction, the judicial proceedings in the case had been concluded, since the judgment had been handed down by the highest court in the ordinary legal system (para. 2.7). The author lodged further applications for legal protection with a number of judicial authorities which were declared inadmissible on 29 February 2008, 23 April 2008 and 13 April 2012.

10.8 Pursuant to the judgment of 22 May 2007, the Committee is therefore of the view that the final decision in the criminal proceedings against the author was the decision to disallow the appeal in cassation that was handed down on 4 May 2005 by the Criminal Cassation Chamber of the Supreme Court. The fact that the author filed applications for legal protection after that decision had been issued is not relevant to the proceedings before the Committee. In addition, the Committee notes that the author has not given any reason for not having submitted the communication to the Committee until 2013. In the absence of any such explanation, and given that the relevant events in the case took place between 2004, when the conviction was handed down, and 2005, when the Supreme Court disallowed the appeal in cassation, the more than eight-year delay in submitting the communication has not been sufficiently justified and constitutes an abuse of the right to submit a communication.[33]

10.9 In the light of the foregoing, the Committee does not find it necessary to consider the other arguments submitted by the State party and the author with regard to the admissibility of the communication and concludes that the communication is inadmissible under article 3 of the Optional Protocol.

11. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[33] See, for example, *J.B. v. Australia*, paras. 7.6 and 7.7; and *C.L.C.D., V.F.C. and A.F.C. v. Colombia*, para. 6.6.